Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

YPSILANTI BOARD OF EDUCATION, et al.,
Petitioners,

v.

LARWUSON G. MULBAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RAYMOND M. DAVIS
Counsel of Record

THRUN LAW FIRM, P.C.
501 S. CAPITOL AVENUE
SUITE 501
P.O. BOX 40699
LANSING, MI 48901-7899
(517) 374-8820

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Petitioner Ypsilanti Board of Education is not a governmental body with the capacity to sue or be sued pursuant to Michigan Law. Despite this, respondent in this case sued the Ypsilanti Board of Education alleging a violation of Title VII of the Civil Rights Act of 1964. Respondent did not sue the School District of Ypsilanti, which is a legally recognized corporate body and his "employer" under Michigan law. The U.S. District Court dismissed respondent's Title VII claim against the petitioner because the board of education is not a legal entity, but the Sixth Circuit Court of Appeals reversed holding that while the board of education is not a legal entity with the capacity to be sued for state law violations, it still somehow possessed the capacity to be sued pursuant to Title VII.

The question presented is as follows:

1. Whether the Ypsilanti Board of Education can be sued for allegedly violating Title VII even though the board lacks the capacity to sue or be sued pursuant to Michigan statute.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellee and Petitioner: Board of Education of Ypsilanti Public School District.

Plaintiff-Appellant and Respondent: Larwuson Mulbah.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Board of Education for the School District of Ypsilanti ("Ypsilanti Board of Education") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The March 10, 2005 opinion of the Court of Appeals (App., *infra*, 1a-2a) is not reported. The December 2, 2004 opinion of the Court of Appeals (App., *infra*, 3a-9a) also is not reported. The opinion of the district court (App., *infra*, 10a-11a) also is not reported.

JURISDICTION

The judgment of the Court of Appeals denying rehearing in this case was entered on March 10, 2005. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule 17(b) of the Federal Rules of Civil Procedure states: "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . ..*"

STATEMENT

The court below reversed the decision of the district court and held that petitioner could be sued pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), even though Michigan's Revised School Code, Mich. Comp. Laws Ann. § 380.11(a), indicates that boards of education for general powers school districts in Michigan lack the capacity to sue or be sued. Nearly 20 years ago, the Michigan Court of Appeals in *Carlson v. Dearborn Heights Bd. of Educ.*, 157 Mich. App. 653, 668; 403 N.W.2d 598 (1987), held that school districts organized like the petitioner lack the legal capacity to be sued. Until now, Michigan state courts and the federal courts have held true to that principle, which among other things, frees boards, commissions or departments of governmental bodies from the burdens associated with initiating or defending against litigation, leaving those duties to the governmental bodies themselves. This was a policy determination of the Michigan legislature. The Sixth Circuit's ruling in this case usurps that state decision-making authority, and creates a circuit conflict, as other federal courts, including the Fourth and Fifth Circuit Courts of Appeals and the District of Columbia federal circuit, have concluded that governmental boards or departments cannot be sued when not so authorized by their respective state laws.

The issue is one of national importance because the Sixth Circuit's ruling undermines basic tenants of federalism by usurping local control. According to the Sixth Circuit, a claimant can sue a general powers school district's board of education if he/she has a federal law claim, but cannot do so if the cause of action is based on Michigan law. If that is correct, then the federal court has unilaterally determined on its own that a board of education possesses the capacity to be sued for alleged federal law violations even though the

Michigan legislature has expressly determined that such boards of education lack the capacity to be sued.

FACTUAL BACKGROUND

Respondent is a math teacher at Ypsilanti High School. He filed this lawsuit against the petitioner Ypsilanti Board of Education, the head of the high school math department, current and former administrators at the high school, and a building custodian. He alleges that following his hiring on August 28, 2002, he was discriminated against (allegedly based on gender, natural origin and race) because: (1) the math department head allegedly did not meet with him before the first day of classes his first year of teaching, (2) he was allegedly not afforded certain resource materials for his classes, (3) the high school administrators allegedly did not assign respondent to a suitable classroom with suitable furniture and equipment, (4) one high school assistant principle allegedly wrote bogus letters of reprimand, and (5) a building custodian allegedly dumped dirt and papers on respondent's classroom desk. Respondent also alleged that after he filed an EEOC charge, two high school administrators allegedly retaliated against him by: (1) assigning him to a new classroom the following school year, (2) purportedly not giving him master keys or access to his voice mail soon enough, (3) allegedly allowing a teacher at the school to put locks on her classroom cabinets prohibiting respondent from using them, and (4) allegedly not thoroughly investigating respondent's complaint that his cell phone and house keys may have been stolen at school. Respondent did not allege any reduction in pay, benefits or other terms or conditions of employment. He did not allege any direct evidence that any of the above-cited matters were made because of his protected characteristics, or in retaliation for him filing an EEOC claim.

Respondent sued the district's board of education even though that board is not an entity capable of being sued pursuant to Michigan statute. He also sued the high school administrators, the math department head, and the custodian for allegedly violating, among other claims, Michigan's Elliott-Larsen Civil Rights Act and Title VII, even though individuals can not be sued under those regulatory schemes. Petitioner asserted that all of his claims were substantively flawed, and that these flaws mandated dismissal of all of his claims pursuant to Fed. R. Civ. P. 12(b)(6).

Lower Court Proceedings

On May 14, 2003, Magistrate Judge Donald Sheer issued his Report and Recommendation that all of respondent's claims be dismissed against all parties. On May 17, 2003, Federal District Judge Paul D. Borman issued an order remanding Judge Donald A. Scheer's Report and Recommendation for further consideration, raising the concern that the caption to Respondent's Amended Complaint identified the individual defendants "in their individual and official capacities" and as such, appeared sufficient to set forth a 42 U.S.C. § 1983 claim against the individual defendants in their *personal* capacities.

The parties were allowed to respond to Judge Borman's initial order, and petitioner did so on August 21, 2003, pointing out that even assuming *arguendo* that respondent's § 1983 claim appropriately raised causes of action against the individual respondents in their personal capacities, respondent's § 1983 claim still had to be dismissed pursuant to the doctrine of qualified immunity. Magistrate Judge Donald A. Scheer agreed, and issued a Supplemental Report and Recommendation on October 14, 2003 dismissing the § 1983 claims against the individual defendants. Judge

Borman agreed, and on December 30, 2003 issued a judgment in favor of all defendants on all claims pursuant to petitioner's Fed. R. Civ. P. 12(b)(6) motion to dismiss. This dismissal included the dismissal of the Ypsilanti Board of Education on all state and federal claims.

Respondent filed a timely appeal to the Sixth Circuit Court of Appeals. On December 2, 2004, the Court of Appeals affirmed the dismissal of all parties on all causes of action *except* respondent's Title VII claim against petitioner.[1] The court concluded that although the Ypsilanti Board of Education cannot be sued for violations of Michigan state law pursuant to Michigan's Revised School Code, as reasoned by the magistrate judge, the board could still somehow be sued for violations of federal law.

Petitioner timely filed a petition for rehearing *en banc* concerning that precise issue, and the petition was presented to the panel which dismissed the original action and circulated to all other active judges of that court. On March 10, 2005, the panel issued an order denying the petition for rehearing and concluding that the issues raised in the petition had already been fully considered with the original submission and decision of the case. In doing so, the Court of Appeals did not explain how the Ypsilanti Board of Education could be an entity with the capacity to be sued under Title VII, when it could not be a legal entity with the capacity to be sued based on state law claims. Instead, the opinion conflicted with the Michigan Court of Appeals decision in *Carlson* and other federal court decisions examining whether governmental

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[1] Respondent did not appeal the decision. Accordingly, all parties and causes of action have been dismissed *except* respondent's Title VII claim against the petitioner.

boards, commissions or departments maintain the capacity to be sued when not so authorized by their respective state legislatures.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW CONFLICTS WITH FED. R. CIV. P. 17 AND OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

A. Based on Michigan's Revised School Code, the Ypsilanti Board of Education Lacks the Capacity to Be Sued.

The legal capacity of the Ypsilanti Public School District and its components (including the Ypsilanti Board of Education) is determined by Michigan law. Michigan general powers public school *districts* are political subdivisions under state law. *See* MCL § 2.161(b); MCL § 18.1115(5); MCL § 21.233(5); MCL § 37.2103; MCL § 124.531; MCL § 691.1401(b). Michigan law is clear that a general powers school district's *board of education*, however, lacks the legal capacity to sue or be sued. Michigan's Revised School Code classifies school *districts*, and not school *boards*, as corporate bodies. MCL 380.11a(5).

In Michigan, school boards are a governing mechanism within a school district, but do not themselves have independent, legal existence. Michigan courts have expressly examined and approved the district court's ruling, holding that boards of education of Michigan public schools (other than boards of education of "first class" school districts – *i.e.*, Detroit Public Schools) lack the legal capacity to sue or be

sued.[2] *Carlson v. North Dearborn Heights Bd. of Educ.*, 157 Mich. App. 653, 668; 403 N.W.2d 598 (1987); *see also* Mich. Comp. Laws Ann. § 380.11(a)(5)-(9) (classifying *only* the school districts, *not their boards of education*, as bodies corporate).

In *Carlson*, a teacher employed by the North Dearborn Heights School District brought suit, claiming unfair representation by her union, violation of due process rights, and violation of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws. Ann. § 37.2101, *et seq.* *Id.* at 660-61. Respondent sued the boards of education of the North Dearborn Heights and Crestwood school districts *Id.* at 668. The Michigan Court of Appeals affirmed the dismissal of both school boards, finding that they lacked the capacity to be sued under Michigan's School Code. In doing so, the court reasoned as follows:

> Finally, Plaintiff claims that the trial court erred when it dismissed the North Dearborn and Crestwood school boards from the suit. The trial court dismissed the school boards from the suit because the Fourth Class School District Act, M.C.L.A. § 38.101, *et seq*; N.S.A. § 15.4101, *et seq*, is silent on the ability of a fourth-class school board to sue or be sued. Plaintiff concedes both school boards are fourth-class school boards. MCLA § 380.1132(1); MSA § 14.41132(1) provides that "[e]ach school *district* shall be a body corporate under the name provided in this Act [and] may sue and be sued in its own name." (Emphasis added.)

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[2] Detroit Public Schools is the only district in Michigan large enough to be "first class." MCL § 380.402.

> MCLA § 38.41(3); MSA § 15.4401(3) specifically provides that a first class school district *board* may be sued. There is no similar provision for a fourth-class school board. MCL § 380.101, *et seq*; MSA § 15.4010, *et seq*. Hence, we can only conclude that a fourth-class school board, as opposed to a school district, is not a corporate body which may sue or be sued. Compare MCL § 380.401(3); MSA § 15.4401(3). The trial court, therefore, properly dismissed both school boards from this case and we affirm its order to do so.

157 Mich. App. at 668 (emphasis in original).

Although the Michigan statutory classification of school districts was subsequently condensed, the *Carlson* analysis still applies. As of July 1, 1996, the Revised School Code reduced the statutory classification of Michigan public school district from "four classes" as well as primary, local act, and special acts school districts, to a school district of the "first-class" (only Detroit Public Schools), and "general powers school districts" (all other public schools). Mich. Comp. Laws Ann. §§ 380.6(2); 380.11; and 380.11a. Notably, Mich. Comp. Laws Ann. § 380.401(3) continues to define *only* the board of education of a "first-class" district as a body corporate which may sue and be sued in its own name.

As to general powers school districts, the Revised School Code continues to classify *only* the districts, *not their boards of education*, as bodies corporate. Mich. Comp. Laws Ann. § 380.11(a)(5)-(9). The Michigan Legislature has therefore not conferred upon the *boards* of general powers school districts the status of "bodies corporate." *Id.* Additionally, the Revised School Code expressly declined to disrupt the function of boards of education of school districts classified as

"general powers" districts. Mich. Comp. Laws Ann. § 380.11(a)(8). Accordingly, the statutory distinction relied upon by the Michigan Court of Appeals in *Carlson* remains in effect, and boards of general powers school districts lack the capacity to sue or be sued in Michigan. Because the School District of Ypsilanti is not a district of the "first class," its board of education lacks the legal capacity to be sued.

B. The Ruling Below Conflicts with Previous Decisions of Other Federal Courts and Fed. R. Civ. P. 17(b).

The legal principle that a board of education cannot be sued in its individual capacity is not new or extraordinary. Indeed, utilizing an analysis consistent with *Carlson,* the United States District Court for the District of Columbia dismissed the District of Columbia Board of Education from a federal lawsuit for this reason. *Tschanneral v. District of Columbia Bd. of Educ.*, 594 F. Supp. 407 (D. D.C. 1984). In *Tschameral*, the district court observed that, although the statute establishing the District of Columbia Board of Education vested control of the school district in the board, it failed to provide that it could sue or be sued. *Id.* at 409. In examining the legal capacity of the District of Columbia Board of Education, the district court noted that a similar statute relating to the Board of Trustees of the University of the District of Columbia specifically provided that it was "a body corporate," which may "sue or be sued." *Id.* The district court concluded that:

> Since the statute establishing the District of Columbia Board of Education, unlike the statute establishing the Board of Trustees of the University of the District of Columbia, does not provide that the Board of Education may sue or be sued, the Board is not a suable entity and may not be sued; therefore, the

> action against the Board of Education must be dismissed.

Id. See also, Michelin v. Jenkins, 704 F. Supp. 1, 7 (D. D.C. 1989) ("Board of Education is not a legal entity, and therefore it is not subject to suit"); *Miller v. Board of Educ.*, 106 F. Supp. 988, 989 (D. D.C. 1952) (board of education is not an entity and cannot be sued).

Before one can maintain an action against an entity, that entity must possess the legal capacity to be sued. Federal Rule of Civil Procedure 17(b) ("Rule 17") specifically states:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . ..*

Accordingly, pursuant to Rule 17(b), the capacity of a governmental body to be sued under Title VII (or any other federal statute) is governed by the law of the state in which the entity was organized. 4 James W. Moore, Moore's Federal Practice § 17.26[3], at 17-112 (3d ed. 1997) ("The capacity of an entity charted by a state is determined by the organizing state's law."). Political subdivisions of a state or local government, such as the Ypsilanti Board of Education, have capacity only if the law creating them recognizes them as separate legal entities having capacity to sue or be sued." 4 Moore, *supra*, § 17.26[3], at 17-112; *see also Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313-14 (5th Cir. 1991) (examining Texas code for determination of whether police

department had independent basis to be sued); *Avery v. County of Burke*, 660 F.2d 111, 113-14 (4th Cir. 1981) (determining that neither the Board of Health nor the Board of Social Services is a corporate body subject to suit).[3]

In *Darby*, a former police officer sued the Pasadena Police Department (not the City of Pasadena) for violation of Title VII. After the district court dismissed his claims for failing to sue the correct entity, Darby appealed to the Fifth Circuit. Affirming the district court's decision, the Fifth Circuit, pursuant to Rule 17, examined Texas law in order to determine whether the Pasadena Police Department lacked the capacity to be sued. Determining that under state law a Texas city is allowed to designate whether one of its own subdivisions can be sued as an independent entity, the court held that "absent this authorization, Darby's suit no more can proceed against the police department alone than it could against the accounting department of a corporation." *Id.* at 313. Similar to the respondent in this case, Darby sought recovery from an entity that was not a corporate body under

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[3]*See also Parker v Ft. Worth Police Dep't*, 980 F.2d 1023, 1026 (5th Cir. 1993); *Smith-Berch, Inc. v. Baltimore County*, 68 F. Supp. 2d 602, 619 (D. Md. 1999); *Hutchison v Brookshire Bros., Ltd.*, 205 F. Supp. 2d 629, 635 (E.D. Tex. 2002); *Paredes v. City of Odessa*, 128 F. Supp. 2d 1009, 1013 (W.D. Tex. 2000); *Jeffery v. Dallas County Med. Examiner*, 37 F. Supp. 2d 525, 528 (N.D. Tex. 1999); *Dillon v. Jefferson County Sheriff's Dep't*, 973 F. Supp. 626, 628 (N.D. Tex. 1997); *Jacobs v. Port Neches Police Dep't*, 915 F. Supp. 842, 844 (E.D. Tex. 1996); *Rideau v. Jefferson County*, 899 F. Supp. 298, 301 (D. Tex. 1995); *Fultz v. Whittaker*, 187 F. Supp. 2d 695, 708 (W.D. Ky. 2001); *Haines v. Metropolitan Gov't of Davidson County*, 32 F. Supp. 2d 991, 994 (M.D. Tenn. 1998); *Buchanan v. City of Kenosha*, 57 F. Supp. 2d 675, 678 (E.D. Wis. 1999).

state law. *Id.* Therefore the district court in *Darby*, like the district court in this case, did not err by holding that a suit brought against an entity with no jural existence is subject to dismissal. *Id.*

C. The Circuit Conflict Created by the Ruling Below Concerns An Important Federal Question.

By disregarding Fed. R. Civ. P. 17, Michigan law, and voluminous precedent from other federal courts, the ruling below has judicially transformed Ypsilanti's Board of Education into a legal entity for Title VII purposes, even though governing state law holds that the board lacks the capacity to be sued. In doing so, the court ignored basic federalism concepts. *See Zee Med. Distrib. Ass'n v. Zee Med.*, 23 F. Supp. 2d 1151, 1159 (N.D. Cal. 1998). As this Court has stated, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78; 58 S. Ct. 817; 82 L. Ed. 1188 (1938). The lower court's failure to recognize the Michigan legislature's autonomy in deciding whether a public school board of education is an entity with the capacity to be sued is an extremely important federal question.

D. *Soper v. Hoben* Is Inapplicable to Title VII Claims.

The lower court relied on *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999), in ruling that respondent's Title VII claims against the Ypsilanti Board of Education were not prohibited by its lack of legal capacity under state law. Specifically, the Court of Appeals' *entire* analysis with respect to the Ypsilanti Board of Education's ability to be sued under federal law is as follows:

In the present case, the district court held that under Michigan law, the Ypsilanti Board of Education cannot be sued. This court has held that:

> A local governmental entity may be held liable under 42 U.S.C. § 1983 for violations of federal law committed pursuant to a governmental "policy or custom." *See Monell v. Dept. of Social Service of the City of New York*, 436 U.S. 658, 694; 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978). A school district is a local governmental entity. *See Lopez v. Houston Ind. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987). It logically follows that a school board is also a local governmental entity.

Soper v. Hoben, 195 F.3d 845, 853-54 (6th Cir. 1999). Therefore, although the defendant school board cannot be sued for violations of Michigan state law, as reasoned by the magistrate judge, the school board can be sued for violations of federal law.

(Order, p. 2).

The Court of Appeals' reliance on *Soper* is misplaced, as that case only examined a school board's ability to be sued as a local governmental entity under 42 U.S.C. § 1983. *Soper* did not address whether a school board which is not a corporate body could somehow be an "employer" under *Title VII*. Importantly, the lower court explicitly upheld the dismissal of all 42 U.S.C. § 1983 claims in this action, and the only claims remaining are based on Title VII. Accordingly, even if *Soper* stood for the premise that a Michigan Board of Education is an entity which could be sued

under 42 U.S.C. § 1983, regardless of contrary state law, *Soper* has no impact on the ability to sue a school board under Title VII. The Court of Appeals improperly reinstated Title VII claims against the petitioner by relying on inapplicable case law.

This Court's recent decision in *City of Rancho Palos Verdes v. Abrams*, ___ U.S. ___; 125 S.Ct. 1453; 161 L. Ed. 2d 316 (2005), supports the petitioner's argument that 42 U.S.C. § 1983 relief, including determining who can be sued thereunder, is irrelevant with respect to the propriety of reinstating Title VII claims. In *City of Rancho Palos Verdes*, this Court held that relief under 42 U.S.C. § 1983 was precluded by the availability of separate and distinct relief from another federal law. Because Title VII provides for remedies different than those available under 42 U.S.C. § 1983, the Court of Appeals' analysis of whether the petitioner could be sued under 42 U.S.C. § 1983 is inappropriate and inapplicable. Any discussion regarding the ability to sue the Ypsilanti Board of Education should have been based on Title VII, not 42 U.S.C. § 1983.

E. The Ypsilanti Board of Education Cannot Be Sued Individually Under Title VII.

As previously explained, the Ypsilanti Board of Education cannot be sued in its individual capacity under federal law in accordance with Fed. R. Civ. P. 17. On that basis alone, the Court of Appeals' order should be vacated. Nevertheless, even if the Ypsilanti Board of Education had the legal capacity to be sued, liability should not attach under Title VII.

Title VII prevents discrimination by "employers," defined to include a "person . . . and any agent of such person." 42 U.S.C. § 2000e(b). A "person" includes "one or more

individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated associations, trustees, trustees in cases under Title 11, or receivers." 42 U.S.C. § 2000e(a). A "person" and, therefore, an "employer" does not expressly include a school board or committee, especially one lacking legal capacity.

Michigan law is clear that school boards are merely the governing bodies of school districts. MCL 380.11a(5). *School districts*, not school boards, are the employers of teachers and other educational staff. Accordingly, Michigan school boards of education are not "governments," "governmental agencies," or "political subdivisions" for Title VII purposes. MCL 380.11a(3) provides in relevant part:

> A general powers *school district* has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to any power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of any function related to operation of the school district in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> . . .
>
> (d) Hiring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and others to carry out school district powers . . ..
>
> [Emphasis added].

Because the Ypsilanti Board of Education is merely the governing body of, and not itself, an "employer" for Title VII purposes, the Ypsilanti Board of Education cannot be directly liable under Title VII.

Moreover, while liability may be imposed on an "agent" of a "person," Title VII does not define an "agent." It would be improbable indeed for the Ypsilanti Board of Education to be an agent of the school district under Michigan law. The Michigan Supreme Court has stated that:

> It is elementary that one may act in the interest of another, with or without his knowledge, without becoming technically his agent. An agency in legal concept is a legal contract, and, to be binding, must possess all the legal elements of a contract, amongst which is a valid consideration.

Cunningham v. Irwin, 182 Mich. 629, 637; 148 N.W. 786 (1914).

The Ypsilanti Board of Education has not entered into any express agreement with the school district to act as its agent, nor has it received any valid consideration for this purpose. It would be unusual for the Ypsilanti Board of Education, in its individual capacity, to enter into an agency agreement with the school district, through itself, as the school district's governing body. It is unlikely that the Ypsilanti Board of Education is an agent of the school district within the meaning of Title VII. Of course, this issue was never addressed by the district court or the Court of Appeals. Even if the school board was an "agent," agents cannot be individually liable under Title VII. In *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997), the Court of Appeals stated:

> The majority of courts addressing this issue have concluded that 'the obvious purpose of this agent provision was to incorporate respondeat superior liability into the statute.' *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); *See also Gary v. Long*, 313 U.S. App. D.C. 403, 59 F.3d 1391, 1399 (D.C. Cir.); *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994). This common interpretation of the scope of the agent clause in Title VII finds support in the Supreme Court's discussion in *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 72, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), wherein the Court stated that 'Congress' [sic] decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of the employees for which employers under Title VII are to be held responsible.' *Id.* at 72. Notably, while the Supreme Court found that Congress's purpose in including 'agent' in the definition of employer was to define the scope of liability of the employer, it said nothing about any liability on the part of the employee/agent.
>
> . . . Additionally, as the Second Circuit noted, the legislative history indicates that in the floor debates over § 2000e(b), no mention was made of agent liability, further 'implying that Congress did not contemplate agent liability under Title VII.' *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

As held in *Wathen*, agents are named in Title VII so as to prevent employers from avoiding respondeat superior liability. *Id.* Accordingly, it is improper to seek liability against the petitioner, as agent, without seeking liability

against the school district employer. Because the school district employer was not named as a party defendant, Title VII claims against the Ypsilanti Board of Education must be dismissed.

In short, the lower court's Order should be vacated because: (1) under Michigan law, petitioner is not a legal entity subject to a lawsuit; (2) Fed. R. Civ. P. 17(b) states that Michigan law is controlling in determining whether the petitioner possesses such capacity; (3) the Court of Appeals' order wholly relies on *Soper*, which strictly applies to claims under 42 U.S.C. § 1983, all of which have been dismissed in this matter, and (4) the petitioner is not a suable party under Title VII because: (a) the petitioner is not an "employer," (b) the petitioner is not an agent, and (c) even if an agent, the petitioner cannot be liable without the school district as principal, also being named. Accordingly, the Court of Appeals erred in finding that respondent's Title VII claims against the petitioner should continue.

CONCLUSION

The petition for writ of certiorari should be granted and the Sixth Circuit's order vacated.

Respectfully submitted,

THRUN LAW FIRM, P.C.
Attorneys for Petitioner

Date: June 8, 2005

Raymond M. Davis (P60428)
Counsel of Record
Kirk C. Herald (P60657)
Cullen B. Casey (P67552)
501 S. Capitol Ave., Suite 500
P.O. Box 40699
Lansing, MI 48901-7899
(517) 484-8000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1109

[Filed March 10, 2005]

LARWUSON G. MULBAH, Plaintiff-Appellant,	)
v.	)
YPSILANTI BOARD OF EDUCATION, ET AL, Defendants-Appellees	)

BEFORE: NORRIS and COOK, Circuit Judges; and BECKWITH,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1109

[Filed December 2, 2004]

LARWUSON G. MULBAH, Plaintiff-Appellant,	)
v.	)
YPSILANTI BOARD OF EDUCATION, ET AL, Defendants-Appellees	)

BEFORE: NORRIS and COOK, Circuit Judges; and BECKWITH,* District Judge.

ORDER

Larwuson G. Mulbah, proceeding pro se, appeals the district court's grant of defendants' motion to dismiss. This case has been referred to a panel of the court pursuant to Rule

* Hon. Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In his amended complaint filed in the district court, Mulbah raised the following claims: (1) defendants violated 42 U.S.C. § 1981 by discriminating against plaintiff on the basis of race; (2) pursuant to 42 U.S.C. § 1983, defendants violated plaintiff's civil rights under color of state law; (3) in violation of 42 U.S.C. § 1985, defendants conspired to interfere with plaintiff's civil rights for the purpose of depriving plaintiff of the equal protection of the laws or of privileges under the law; (4) defendants discriminated against plaintiff on the basis of race, in violation of the Michigan Elliott-Larson Civil Rights Act, the U.S. Civil Rights Act of 1964, and the U.S. Civil Rights Act of 1991; (5) defendants discriminated against plaintiff on the basis of national origin, in violation of the Michigan Elliott-Larson Civil Rights Act, the U.S. Civil Rights Act of 1964, and the U.S. Civil Rights Act of 1991; (6) defendants discriminated against plaintiff on the basis of gender, in violation of the Michigan Elliott-Larson Civil Rights Act, the U.S. Civil Rights Act of 1964, and the U.S. Civil Rights Act of 1991; (7) defendants retaliated against plaintiff, in violation of the Michigan Elliott-Larson Civil Rights Act, the U.S. Civil Rights Act of 1964, and the U.S. Civil Rights Act of 1991; and (8) defendant Board's agents intentionally interfered with plaintiff's contractual and business relationship with the Board by discriminating, retaliating, and conspiring against plaintiff.

We review de novo whether the district court properly dismissed the suit pursuant to Fed. R. Civ. P. 12(b)(6). *See Arrow v. Fed. Reserve Bank,* 358 F.3d 392, 393 (6th Cir. 2004). We must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as

true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Id.* This standard of review requires more than the bare assertion of legal conclusions. *See Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001). "In practice, a. . .complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Lillard v. Shelby Count. Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996) (original emphasis, citation omitted).

In the present case, the district court held that under Michigan law, the Ypsilanti Board of Education could not be sued. This court has held that

> A local governmental entity may be held liable under 42 U.S.C. § 1983 for violations of federal law committed pursuant to a governmental "policy or custom." *See Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). A school district is a local governmental entity. *See Lopez v. Houston Ind. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987). It logically follows that a school board is also a local governmental entity.

Soper v. Hoben, 195 F.3d 845, 853-54 (6th Cir. 1999). Therefore, although the defendant school board cannot be sued for violations of Michigan state law, as reasoned by the magistrate judge, the school board can be sued for violations of federal law.

Regarding Mulbah's § 1981 claims against the school board and the individual defendants in their official capacities, the claims are dismissed as a matter of law because plaintiff

also brought claims against those defendants under 42 U.S.C. § 1983, and the two claims cannot be pursued simultaneously, as reasoned by the magistrate judge. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *McCrary v. Ohio Dep't of Human Servs.*, No. 99-3597, 2000 WL 1140750, at *2 (6th Cir. Aug. 8, 2000) (citing *Jett*, 491 U.S. at 731).

Plaintiff also brought a § 1983 claim against the individual defendants in their official capacities and against the school board. A local governmental entity, such as a school board, is not subject to liability under § 1983 pursuant to the doctrine of respondeat superior. *See Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 507 (6th Cir. 1996) (citing *Monell*, 436 U.S. at 691). The school board "cannot be found liable unless the plaintiff can establish that an officially executed policy, or the toleration of a custom within the school district leads to, causes, or results in the deprivation of a constitutionally protected right." *Id.* (citing *Monell*, 436 U.S. at 690-91). Plaintiff has not asserted the existence of any such policies or customs within the school district, so his § 1983 claim against the school board was properly dismissed.

Additionally, concerning Mulbah's § 1983 claim against the individual defendants in their official capacities, a § 1983 action against a defendant in his official capacity is equivalent to a suit against the local governmental entity (in this case, the school board). *See Leach v. Shelby Count. Sheriff*, 891 F.2d 1241, 1241 (6th Cir. 1989). Therefore, because the claim against the school board was properly dismissed, the § 1983 claim against the individual defendants in their official capacities was also properly dismissed.

Mulbah next brings a § 1985 claim against the school board and the individual defendants in their official capacities. Specifically, plaintiff alleges that the defendants conspired to

interfere with his civil rights for the purpose of depriving him of the equal protection of the laws or of privileges under the law. To have a conspiracy, at least two persons or entities must be involved. *See Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir. 1991). In the present case, because all of the defendants are members of the same collective entity, the Ypsilanti Board of Education, there are not two separate people or entities to form a conspiracy. *Id.* at 510. Therefore, Mulbah's § 1985 claim against the school board and the individual defendants in their official capacities was properly dismissed.

Mulbah also brought §§ 1981, 1983, and 1985 claims against the individual defendants in their individual capacities. In his supplemental report and recommendation, the magistrate judge recommended dismissing these claims because the defendants were entitled to qualified immunity. The magistrate judge then informed the parties that if they had objections to his recommendations. they could file objections with the court within ten days of receiving the report and recommendation. He further informed the parties that any objections made must be specific, or they would be waived.

It appears that Mulbah did not file with the district court any objections to the magistrate judge's supplemental report and recommendation. Therefore, his §§ 1981, 1983, and 1985 claims against the individual defendants in their individual capacities are deemed waived on appeal. *See United States v. Walters,* 638 F.2d 947, 949-50 (6th Cir. 1981).

Next, Mulbah claims that defendants discriminated against him on the basis of race, national origin, and gender, and also retaliated against him in violation of the Michigan Elliott-Larson Civil Rights Act, the U.S. Civil Rights Act of 1964, and the U.S. Civil Rights Act of 1991. With respect to these

claims under the Michigan Elliott-Larson Civil Rights Act, the school board is itself not liable, as the magistrate judge noted, because it is unable to be sued under Michigan law. Additionally, the individual defendants are not liable in their individual or official capacities for any alleged violations of the Michigan Elliott-Larson Civil Rights Act, because only employers may be held liable for the acts of their agents under this law. *See Jager v. Nationwide Truck Brokers, Inc.*, 652 N.W.2d 503, 514-515 (Mich. Ct. App. 2002). Therefore, Mulbah's claims under the Michigan Elliott-Larson Civil Rights Act were properly dismissed.

Further, with respect to his claims under Title VII, the individual defendants cannot be found liable in their individual capacities. Rather, they could only be found liable in their official capacities, and therefore the Title VII claims against them operate as claims against their employer, the board of education. *See generally Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404 (6th Cir. 1997). Because the district court improperly dismissed plaintiff's Title VII claims against the board on the basis that the board could not be sued under Michigan law, we vacate the district court's decision to dismiss these claims and remand the case to the district court for further consideration.

Finally, plaintiff asserts a claim of tortious interference with a contract or advantageous business relationship or expectancy. "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *Feaheny v. Caldwell*, 437 N.W.2d 358, 362-63 (Mich. Ct. App. 1989) (citations omitted).

In the present case, because all of the individual defendants are employees of the school board, and plaintiff has not alleged that they acted in their own behalf with no benefit to the board, they are not considered "third parties." *See generally Reed v. Mich. Metro Girl Scout Council,* 506 N.W.2d 231, 233 (Mich. Ct. App. 1993) (citations omitted). Therefore, Mulbah's claim of tortious interference with a contract or advantageous business relationship or expectancy was properly dismissed.

The district court's judgment regarding Mulbah's Title VII claims of race, national origin, and gender discrimination, as well as retaliation, against the defendant Ypsilanti Board of Education is vacated, and the case is remanded for further proceedings regarding those claims. The district court's judgment is affirmed regarding plaintiff's remaining claims. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 02-72232

[Filed December 30, 2003]

LARWUSON G. MULBAH, Plaintiff,	)
v.	)
YPSILANTI BOARD OF EDUCATION, et al., Defendants.	)

JUDGE PAUL D. BORMAN
MAG. JUDGE DONALD A. SCHEER

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AS MODIFIED BY MAGISTRATE JUDGE'S SUPPLEMENTAL REPORT AND RECOMMENDATION GRANTING DEFENDANTS' MOTION TO DISMISS

The Court has reviewed the Magistrate Judge's Report and Recommendation filed on May 14, 2003, and the

Supplemental Report and Recommendation, filed on October 14, 2003, as well as any objection filed thereto.

IT IS ORDERED that the Report and Recommendation granting defendants' motion to dismiss, as modified by the Supplemental Report and Recommendation granting defendants' motion to dismiss all claims against Defendants in their individual capacities, is accepted and entered as the findings and conclusions of this Court.

/s/_____
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: Dec 30 2003
Detroit, Michigan

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 02-72232

[Filed December 30, 2003]

LARWUSON G. MULBAH,	)
Plaintiff,	)
	)
v.	)
	)
YPSILANTI BOARD OF EDUCATION, et al.,	)
Defendants.	)
	)

JUDGE PAUL D. BORMAN
MAG. JUDGE DONALD A. SCHEER

JUDGMENT

On this date, the Court accepted the Report and Recommendation of Magistrate Judge Donald A. Scheer.

Therefore, a judgment shall be entered in favor of the Defendants, Ypsilanti Board of Education, et al., and against the Plaintiff, Larwuson G. Mulbah.

DATED: 12/30/03

DAVID J. WEAVER
CLERK OF COURT

/s/_____
JONIE PARKER
DEPUTY CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 02-72232

[Filed October 14, 2003]

LARWUSON G. MULBAH, Plaintiff,	)
v.	)
YPSILANTI BOARD OF EDUCATION, et al., Defendants.	)

JUDGE PAUL D. BORMAN
MAG. JUDGE DONALD A. SCHEER

SUPPLEMENTAL REPORT AND RECOMMENDATION

I. SUPPLEMENTAL RECOMMENDATION

I recommend that plaintiff's claims under 42 U.S.C. §§ 1981, 1983 and 1985 be dismissed for failure to state a claim upon which relief may be granted.

II. REPORT:

A. Procedural History

Plaintiff's Amended Complaint was filed on June 20, 2002. Named as defendants are the Ypsilanti Board of Education and five individual employees of the Ypsilanti school system. Plaintiff alleges that he was subjected to discrimination in his employment based upon his race, national origin and gender. His Complaint alleges discriminatory treatment with respect to the provision of facilities, equipment and supplies necessary to carry out his duties as a teacher at Ypsilanti High School. He further maintains that he was subjected to harassment, intimidation and unwarranted discipline, and that improper personnel management procedures were employed by the school administration with respect to him, but not as to others. Finally, he maintains that a settlement agreement intended to rectify the unfair treatment of him was undermined by a conspiracy among several of the defendants, and that retaliatory action was taken against him because he sought to enforce his civil rights. Defendants' filed an Answer, a Motion to Dismiss and a Motion for Summary Judgment. In a Report and Recommendation filed May 14, 2003, I dealt only with the issues raised in the Defendants' Motion to Dismiss. I recommended that plaintiff's Complaint be dismissed, subject to his right to file an Amended Complaint within a reasonable time.

My recommendation was based, in part, upon my conclusion that plaintiff had inadequately manifested his intent to assert his various claims against the individual defendants in their individual capacities. In an Order of July 8, 2003, the Court remanded the Report and Recommendation to me for additional consideration of that issue. On August 1,2003, I

entered an Order for Supplemental Briefing. Defendants thereafter filed a Supplement Brief in Support of Their Motion to Dismiss.

B. Applicable Law and Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint must be dismissed if it fails to state a claim upon which relief may be granted. In assessing a motion to dismiss, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Allard v. Weitzman, (In Re: Delorean Motor Company), 991 F.2d 1236, 1239-40 (6th Cir. 1993) (citing Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990); see also, Conley v. Gibson, 355 U.S. 41 (1957). "A complaint need not set down in detail all the particulars of a plaintiff's claim, but must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Lillard v. Shelby County Board of Education, 76 F.3d 716, 726 (6th Cir. 1996) (citations omitted).

Although the standard is liberal, it requires more than the bare assertion of legal conclusions. In Re: Delorean Motor Company, 991 F.2d at 1240; Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1998). The complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Scheid, 859 F.2d at 436 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985)). In the context of a civil rights action, "conclusory allegations of unconstitutional conduct without specific factual allegations

failed to state a claim." Lillard, 76 F.3d at 726. A factual basis for the claim must be set forth in the pleadings. Id.

Dismissals of complaints brought under civil rights statutes are scrutinized with special attention. Brooks v. State, 779 F.2d 1177, 1180 (6th Cir. 1985). A pro se plaintiff's complaint will be held to a less stringent standard than one drafted by an attorney. Haynes v. Kurner, 404 U.S. 519, 520 (1972). Nevertheless, the court will not engage in a guessing game in order to determine the nature of the claims asserted by a pro se litigant. Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989). In addition, even valid constitutional or statutory claims must be asserted against persons or entities who may be properly held liable for the unlawful conduct alleged.

C. Analysis

I.

The Court has remanded my Report and Recommendation of May 14, 2003 for reconsideration of my conclusion that plaintiff had failed to give adequate notice of his intent to assert federal civil rights claims against the defendants in their individual capacities. The Remand Order noted that the caption of plaintiffs Amended Complaint expressly stated that he was bringing claims against the individual defendants "in their individual and official capacities, jointly and severally." The district judge further observed that such a declaration is sufficient to set forth a Section 1983 claim against the defendants in both their individual and official capacities. The Order cited Fluellen v. United States Department of Justice Drug Enforcement Administration, 816 F.Supp. 1206, 1212 (E.D. Mich. 1993) and Moore v. City of Harriman, 272 F.3d 769, 771 (6th Cir. 2001). In Fluellen, Judge Hackett squarely held that the plaintiff had adequately asserted claims against

the defendants individually in a multi-count complaint, based on the fact that he "unambiguously" captioned the complaint against the officers in both official and individual capacities. In Moore, the Sixth Circuit held that the plaintiff had adequately asserted individual capacity claims against the defendants in the body of his various counts, after noting that the "complaint caption did not specify whether the officers were named in their official or individual capacities." The implication of the quoted comment appears to be that a statement in the caption of the multi-count complaint may well have sufficed to inform the defendants of the possibility of individual liability.

While I have reservations about the policy implications of the decisions cited by the Court,[1] I acknowledge them as sufficient to support a finding that plaintiff's individual liability claims have been asserted with sufficient clarity. That being the case, it is appropriate to evaluate plaintiffs 42 U.S.C. §§ 1981, 1983 and 1985 claims against defendants in their individual capacities in light of the defendants' assertion of the defense of qualified immunity. In response to my order for supplemental briefing, the defendants have filed a written

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[1] It should not be too much to ask, even of pro se plaintiffs that they "set forth clearly in their pleadings that they were suing state officials as individuals, rather than officials." Moore, 272 F.3d at 772. In the context of a multi-count complaint, an assertion of capacity in the caption is certainly not "unambiguous," since a plaintiff may intend to assert personal liability in some counts and not others. Simply assuming a "global" claim of person liability, especially in the absence of confirmatory assertions in the body of each count, is an unnecessary burden of the defendants and the court. The "course of proceedings" test actually employed in Moore v. City of Harriman, should, in my view, determine the issue, without undue emphasis of the content of the caption.

argument in support of their immunity defense. For the reasons set out in the remainder of this Supplemental Report and Recommendation, I find that the plaintiff has failed to state a claim upon which relief may be granted, and that dismissal of Counts I, II and III of the Amended Complaint is appropriate.

II.

In civil suits for money damages, government officials are entitled to qualified immunity for discretionary acts that do not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court found that "substantial costs attend the litigation of the subjective good faith of government officials."

> Not only are there the general costs of subjecting officials to the risks of trial-distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind.
>
> * * *
>
> Judicial inquiry into subjective motivation therefore may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 816-17. The Court opted to define the limits of qualified immunity in objective terms.

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 817-18. In Siegert v. Gilley, 111 S.Ct. 1789 (1991), the Court established that the first inquiry in analyzing a claim of qualified immunity should be whether the plaintiff has alleged the violation of a clearly established constitutional right at all. Whether defendants are entitled to qualified immunity is a question to be resolved at the earliest possible stage of litigation. Saucier v. Katz, 121 S.Ct. 2151, 2156 (2001); Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002).

In the case at bar, Mr. Mulbah's Amended Complaint fails to identify the specific constitutional right(s) whose violation is addressed in Counts I (42 U.S.C. §1981), II (42 U.S.C. § 1983) and III (42 U.S.C. § 1985). No discrete provision of the Federal Constitution or statutes establishes the right to freedom from bad management, or from even the most juvenile and overarchingly stupid workplace pranks. To be sure, workplace decisions which discriminate on the basis of race, national origin or gender may contravene constitutional due process and equal protection guarantees, and/or federal statutory protections. The same may be said of harassing conduct directed toward victims selected on the basis of their race, origin or gender. In any event, however, it is a plaintiff's burden to plead and prove a constitutional or federal statutory violation.

> The affirmative defense of qualified immunity may provide officials with two types of protection. First, it functions as a defense to liability when the actions allegedly taken by officials did not violate "clearly established" law.
>
> * * *
>
> Second, qualified immunity may provide officials with an "immunity from suit" by relieving them from the burdens of both discovery and a trial.

Karen M. Blum & Kathryn R. Urbona, Section 1983 Litigation, p. 81 (1998) (footnotes omitted). The second type of qualified immunity analysis often comes into play in cases where a plaintiff's substantive civil rights claim requires evidence of improper motive on the part of the defendant. In essence, it bears upon the question of whether the plaintiff has stated a claim upon which relief may be granted.

Commentators have noted that the application of the Harlow v. Fitzgerald objective reasonableness standard proved difficult in cases in which a defendant official's subjective intent is a necessary element of the constitutional violation asserted. See, Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation, Section 9.21 (3rd Ed. 1977). Professor Schwartz observed that:

> The circuit courts are in agreement that in these and other circumstances in which the defendant official's intent or motive is an element of the constitutional claim, Harlow does not require the courts to ignore the fact that intent is relevant to the constitutional claim.

* * *

> The courts, however, have experienced difficulties in determining the appropriate procedural framework for resolving qualified immunity defenses when an official's intent is an element of the plaintiff's constitutional claim. More specifically, . . . the courts are in conflict over whether (1) in these circumstances, a heightened pleading requirement should be imposed upon the Section 1983 claimant, and (2) the type of evidence the claimant must produce in order to defeat a motion for summary judgment asserting qualified immunity.

Id. at p. 375.

In Crawford-El v. Britton, 118 S.Ct. 1584 (1998), the Supreme Court stated that its holding in Harlow "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." 118 S.Ct. at 1592. Nonetheless, in deference to the concerns of public officials exposed to the burdens of discovery and trial in cases involving insubstantial claims, the Court declared that:

> It is obvious. . .that bare allegations of malice would not suffice to establish a constitutional claim. It is equally clear that an essential element of some constitutional claims is a charge that the defendants' conduct was improperly motivated. . . . Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of plaintiff's affirmative case. Our holding in Harlow, which related only to the scope of an affirmative defense, provides no support for making

> any change in the nature of the plaintiff's burden of proving a constitutional violation.

Id.

In Crawford-El, the Court considered a case in which a Section 1983 plaintiff alleged that the defendants' diversion of his property was motivated by an intent to retaliate against him for exercising his First Amendment rights. The United States Court of Appeals for the District of Columbia had decided that the plaintiff must establish motive by clear and convincing evidence, and that the reasoning in Harlow v. Fitzgerald required special procedures to protect the defendants from the cost of litigation. The Supreme Court vacated that judgment and remanded the case. The Court determined that special pleading requirements and court-made rules of procedure were neither authorized nor necessary in dealing with Section 1983 actions.

> Most significantly, the statute draws no distinction between constitutional claims that require proof of an improper motive and those that do not. If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation.

Crawford-El v. Britton, 118 S.Ct. at 1596.

In writing for the majority in Crawford-El, Justice Stevens declared that existing procedural devices were sufficient to implement the policy declared by the Court in Harlow that insubstantial claims should not proceed to trial.

When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, non-conclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment. Seigert v. Gilley, 500 U.S. 226, 236, 111 S.Ct. 1789, 1795 (1991) (Kennedy, J, concurring in the judgment). This option exists even if the official chooses not to plead the affirmative defense of qualified immunity. Second, if the defendant does plead the immunity defense, the district court should resolve the threshold question before permitting discovery. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question,

> which sometimes requires complicated analysis of legal issues. (footnote omitted).

Crawford-El v. Britton, 118 S.Ct. at 1596-97.

Taken together, Harlow and Crawford-El stand squarely for the proposition that bare allegations of malice do not suffice to establish a civil rights claim where improper motive is an element of a cause of action. In implementing that policy, the United States Court of Appeals for the Sixth Circuit has held that when a defendant asserts qualified immunity in the face of a claim under Section 1983, the plaintiff cannot rely upon mere notice pleading. Rather, he must set forth specific and non-conclusory allegations of fact that will enable the court to determine whether those facts, if true, will overcome the qualified immunity defense. Rippy v. Hattaway, 270 F.3d 416 (6th Cir. 2001).

Mr. Mulbah has failed in his Amended Complaint to identify the specific federal constitutional right which he claims that the individual defendants have violated. 42 U.S.C. § 1983 confers no substantive rights. Claims under 42 U.S.C. §§ 1981 and 1985 require the element of improper motive.[2] Viewed objectively, the actions which plaintiff claims that the defendants took against him do not amount to a violation of his federal rights in the absence of improper motive on the part of the defendants. Plaintiff's allegations with regard to

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[2] Plaintiffs Title VII claims cannot be directly asserted against the individual defendants. See Report and Recommendation, May 14, 2003, Section 5. A § 1983 claim based upon Title VII rights would require a prima facie case, which includes the element of improper motive. Newman v. Federal Express Corp, 266 F.3d 401 (6th Cir. 2001). Thus, "bare allegations of malice" would not suffice.

motive have been stated in only the most general and conclusory fashion.

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.
>
> [T]he court may order a reply to the defendant's. . . Answer under Federal Rule of Civil Procedure 7(a). . . . Thus, the court may insist that the plaintiff "put forward specific, non-conclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal. . . .

Crawford-El v. Britton, 118 S.Ct. 1584 (1998)(citing Seigert v. Gilley, 111 S.Ct. 1789, 1795 (1991).

All of Mr. Mulbah's claims under 42 U.S.C. §§ 1981, 1983 and 1985 must be supported by specific, non-conclusory allegations of fact sufficient to support an inference of an impermissible motive. When a defense of qualified immunity is asserted, the plaintiff is entitled to the opportunity to come forward with additional facts that show not only the violation of his rights, but also that those rights were so clearly established when the acts were committed that any official in the defendants' position, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from the conduct. If this pleading burden is not carried by plaintiff in either the original Complaint or by a pleading

in response to defendants' assertion of the qualified immunity defense, dismissal is proper. Rippy v. Hattaway, 270 F.3d 416, 423 (6th Cir. 2001); Dominique v. Telb, 831 F.2d 673, 676 (6th Cir. 1987); Cameron v. Seitz, 38 F.3d 264, 273 n.2 (6th Cir. 1994). In the case at bar, Mr. Mulbah did respond to the defendants' assertion of qualified immunity. He filed his "Plaintiff's Answer to Defendants' Affirmative Defense"[3] on July 18, 2002. Unfortunately, that document merely reasserts plaintiff's conclusory claim of intentional discrimination, without specific factual underpinning. Taken together, plaintiff's Amended Complaint and Answer to Defendants' Affirmative Defense fail to supply specific, non-conclusory factual allegations establishing improper motive for the actions of any defendant. As a result, plaintiff has failed to demonstrate all the necessary elements of a violation of his federally secured rights. Therefore, he has failed to establish a cognizable injury sufficient to survive defendants' motion to dismiss. Crawford-El v. Britton, 118 S.Ct. 1584 (1998); Cameron v. Seitz, 38 F.3d 264, 273 n.2 (6th Cir. 1994); Rippy v. Hattaway, 270 F.3d 416, 424-25 (6th Cir. 2001). Simply stated, his pleadings to state a claim upon which relief may be granted.

For the above reasons, I recommend that Counts I, II and III of the Amended Complaint be dismissed.

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[3] FRCP 7(a) provides that the court may order a reply to an Answer. Strictly speaking, Plaintiffs Answer to Defendants' Affirmative Defense is an impermissible pleading in the absence of a court order. As case law in this circuit clearly entitles a plaintiff to respond to the assertion of a qualified immunity defense, however, plaintiff's submission should be accepted as a Rule 7(a) reply.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Section 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991). Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/_____
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: 10/14/03

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 02-72232

[Filed May 14, 2003]

LARWUSON G. MULBAH,
Plaintiff,

v.

YPSILANTI BOARD OF EDUCATION, et al.,
Defendants.

JUDGE PAUL D. BORMAN
MAG. JUDGE DONALD A. SCHEER

REPORT AND RECOMMENDATION

I. RECOMMENDATION:

I recommend that Defendants' Motion to Dismiss be granted, but that plaintiff be afforded a reasonable time within which to file a Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15.

II. REPORT:

A. Procedural History

Plaintiff's Amended Complaint was filed on June 20, 2002. Named as defendants are the Ypsilanti Board of Education and five individual employees of the Ypsilanti school system. Plaintiff alleges that he was subjected to discrimination in his employment based on his race, national origin and gender. His Complaint alleges differential treatment with respect to the provision of facilities, equipment and supplies necessary to carry out his duties as a teacher at Ypsilanti High School. He further maintains that he was subjected to harassment, intimidation and unwarranted discipline, and that improper personnel management procedures were employed by the school administration with respect to him, but not as to others. Finally, he maintains that a settlement agreement intended to rectify the disparate treatment of him was undermined by a conspiracy among several of the defendants, and that retaliatory action was taken against him because he sought to enforce his civil rights.

The defendants have filed an Answer, a Motion to Dismiss and a Motion for Summary Judgment. Plaintiff maintains this action pro se, and difficulties relating to discovery have arisen. For that reason, I have determined to address only the issues raised in defendants' Motion to Dismiss in this Report and Recommendation. Should the court determine that dismissal is not appropriate, I will revisit the status of discovery and make any necessary adjustments prior to consideration of the Motion for Summary Judgment.

B. Applicable Law and Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint must be dismissed if it fails to state a claim upon which relief may be granted. In assessing a motion to dismiss, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Allard v. Weitzman, (In Re: Delorean Motor Company), 991 F.2d 1236, 1239-40 (6th Cir. 1993) (citing Meador v.Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990); see also, Conley v.Gibson, 355 U.S. 41 (1957). "A complaint need not set down in detail all the particulars of a plaintiff's claim, but must simply give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests." Lillard v. Shelby County Board of Education, 76 F.3d 716, 726 (6th Cir. 1996) (citations omitted).

Although the standard is liberal, it requires more than the bare assertion of legal conclusions. In Re: Delorean Motor Company, 991 F.2d at 1240; Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1998). The complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Scheid, 859 F.2d at 436 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985)). In the context of a civil rights action, "conclusory allegations of unconstitutional conduct without specific factual allegations failed to state a claim." Lillard, 76 F.3d at 726. A factual basis for the claim must be set forth in the pleadings. Id.

Dismissals of complaints brought under civil rights statutes are scrutinized with special attention. Brooks v. State, 779 F.2d 1177, 1180 (6th Cir. 1985). A pro se plaintiff's complaint will be held to a less stringent standard than one drafted by an attorney. Haynes v. Kurner, 404 U.S. 519, 520 (1972). Nevertheless, the court will not engage in a guessing game in order to determine the nature of the claims asserted by a pro se litigant. Wells v. Brown, 891 F.2d 591,594 (6th Cir. 1989). In addition, even valid constitutional or statutory claims must be asserted against persons or entities who may be properly held liable for the unlawful conduct alleged.

C. ANALYSIS

Defendants assert the following arguments in support of their Motion to Dismiss:

1) All claims against defendant Ypsilanti Board of Education must be dismissed as a matter of law.

2) Plaintiff's 42 U.S.C. § 1981 claim (Count I) must be dismissed as a matter of law.

3) Plaintiff's 42 U.S.C. § 1983 claim (Count II) must be dismissed as a matter of law.

4) Plaintiff's 42 U.S.C. § 1985 claim (Count III) must be dismissed as a matter of law.

5) Plaintiff's Elliott Larson Civil Rights Act and Title VII claims (Counts IV-VII) must be dismissed as a matter of law.

6) Plaintiff's claim of tortious interference with a contract or advantages business relationship or expectancy (Count VIII) must be dismissed as a matter of law.

I will address each of plaintiff's arguments separately.

Argument 1 - All Claims Against Defendant Ypsilanti Board of Education Must be Dismissed as a Matter of Law.

Plaintiff's Amended Complaint asserts that defendant Ypsilanti Board of Education, is an employer which is vicariously liable for the torts of its employees, principals, assistant principals, department heads, custodians and/or agents committed within the scope of their employment. Defendant's Motion to Dismiss disputes those allegations on the theory that the Ypsilanti Board of Education is not an entity vested by Michigan law with the authority to sue or to be sued. In Carlson v. North Dearborn Heights Board of Education, 157 Mich App. 653 (1987), the Michigan Court of Appeals held that the defendant Boards were not corporate bodies which could sue or be sued. That holding was based upon state statutes dividing school districts and school boards into four classes, and defining the powers with which each such entity was vested. The defendant school boards in question were conceded to be of the fourth class. The Court observed that the statutes were silent on the ability of a fourth class school board to sue or be sued, but that each school district constituted a body corporate empowered to sue or be sued in its own name. MSA § 15.411132(1). The decision also found it significant that MSA § 15.4401(3) specifically provided that a first class school district board could be sued, but that there was no similar provision in the sections relating to a fourth class school board. MCL § 380.101 et seq.; MSA § 15.4101 et seq. "Hence we can only conclude that a fourth

class school board, as opposed to a school district, is not a corporate body which may sue or be sued." On that basis, the Court of Appeals affirmed the trial court's dismissal of the claims against the defendant school boards.

Subsequent amendments of the Michigan statutes relating to school organizations, have reduced the number of classes into which they are divided. The legislature retained the classification of "a school district of the first class," and combined all other classes of school districts into "general powers school district(s)." Under the new classification, Ypsilanti maintains a general powers school district.[1]

Although the amended statutes alter the number of school district classifications, the reasoning of the Michigan Court of Appeals in Carlson still applies. MCL 380.11a(3) lists the rights, powers and duties of a general powers school district and the board of such a district. The statute defines such districts as bodies corporate, but the powers to sue and to be sued do not appear. Nonetheless, the statute expressly declares that "the powers of a school board or school district are not diminished by this section. . . ." MCL 380.11a(9). The status of "body corporate" is not conferred upon the school board of a general powers district under the new law. By contrast, MCL 380.401 (3) specifically provides that "the first class school district board shall be a body corporate under the name and title of 'the board of education of the school district of the city of _____' and under that name may sue and be sued." I am satisfied, therefore, that the

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[1] A school district qualifies as a school district of the first class only if it attains pupil membership of 100,000. MCL 380.402. Defendants assert that Detroit Public Schools is is the only district in Michigan large enough to attain that status. Plaintiff does not contest that proposition.

Michigan legislature has not vested the boards of general powers school districts with the capacity to sue or be sued. Accordingly, I find that this court lacks jurisdiction over plaintiff's claims against the defendant Ypsilanti Board of Education, and that all claims in the Amended Complaint against that defendant must be dismissed.

Argument 2 - Plaintiff's 42 U.S.C. § 1981 Claim (Count I) Must be Dismissed as a Matter of Law.

Count I of Plaintiff's Amended Complaint purports to state a claim for relief under Title 42 USC § 1981 for alleged acts of race discrimination by the defendants. Count II of the Amended Complaint presents a similar claim for relief under Title 42 USC § 1983. Defendants contend that the two claims may not be pursued simultaneously, and that the Section 1981 claim must be dismissed. I agree.

In Jett v. Dallas Independent Scho.ol District, 491 U.S. 701 (1989), the Supreme Court considered the case of a white athletic director/football coach at a public highschool who brought suit under Sections 1981 and 1983 against his former school district and black principal, alleging discrimination in his reassignment. Upon reviewing the legislative history and policy underlying the 1866 Civil Rights Act, the Court determined that the explicit remedial provisions of Section 1983 will be controlling in the context of damage actions brought against state actors alleging violation of the rights declared in Section 1981.

> We hold that the express 'action at law' provided by Section 1983 for the 'deprivation of any rights, privileges, or immunities secured by the constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by

> Section 1981 when the claim is pressed against a state actor.

491 U.S. at 735.

The holding in Jett has been applied by courts in this circuit. "[P]laintiff may not pursue a separate claim under Section 1981 against the city or individual defendants in their official capacity. Rather, Section 1983 provides the exclusive federal remedy against a state actor for a violation of rights protected by Section 1981. (Citing Jett). Thus, while a plaintiff may allege violations under Section 1981 as a basis for a 1983 action, Section 1981 does not provide a separate remedy against the city or against the individual defendants in their official capacities." Fulson v. City of Columbus, 801 F.Supp I (S.D. OH 1992). I am satisfied that the rule applies in this case, and that plaintiff's separate claim for relief under 42 U.S.C. § 1981 must be dismissed.

Argument 3 - Plaintiff's 42 U.S.C. § 1983 Claim (Count II) Must be Dismissed as a Matter of Law.

Defendants maintain that plaintiffs 42 U.S.C. § 1983 claim (Count II) must be dismissed as a matter of law because plaintiff failed to allege that the actions taken against him were part of an official policy or custom. For the reasons that follow, I agree.

Count II of plaintiff's Amended Complaint asserts that "[d]efendants violated plaintiff's civil rights under color of state law. . . ." The Complaint fails to assert that the actions of the defendants were taken pursuant to an official policy or custom. It has long been recognized that a prima facie case under 42 U.S.C. §1983 requires a plaintiff to establish two elements: 1) that the action occurred "under color of law;"

and 2) that the action was a deprivation of a constitutional right or a federal statutory right. Parratt v. Taylor, 451 U.S. 527, 535 (1981). If plaintiff's cause of action in this case was asserted only against the individual defendants, and against each in his or her individual capacity, Count II of the Amended Complaint might state a cause of action. Because the Amended Complaint is directed against a municipal entity and certain of its employees for actions taken in the course of their employment, however, more is required to establish a prima facie case.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that cities were "persons" for the purpose of Section 1983. The Court further held that municipalities and other units of government could be sued only if the plaintiff can make a particular showing.

> Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, the action. . . alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government is an allegation that official policy is responsible for a deprivation of rights protected by the constitution, local governments, like every other Section 1983 "person", by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's official decision making channels.

Monell, 436 U.S. at 690-91. Subsequent cases have refined the Monell doctrine with regard to the level of official activity necessary to create a custom or policy giving rise to liability. It is generally recognized, however, that a local government entity is not subject to liability solely by reason of respondeat superior, and that a plaintiff may recover against that entity only by establishing that an "officially executed policy, or the toleration of a custom . . . leads to, causes or results in the deprivation" of a protected right. Doe v. Claiborne Company, 103 F.3d 495, 507 (6th Cir. 1996).

In the case at bar, plaintiff makes no allegation of an official policy or custom of the Ypsilanti School System which led to or caused the deprivation of his constitutional rights. To withstand a Motion to Dismiss, a Complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Scheid v. Fanny Farmer CandyShops, Inc., 859 F.2d 434, 436 (6th Cir. 1998). In the context of a civil rights action, "conclusory allegations of unconstitutional conduct without specific factual allegations (fail) to state a claim." Lillard v. Shelby County Board of Education, 76 F.3d 716, 726 (6th Cir. 1996).

Plaintiff's failure to allege that the acts of the individual defendants were taken pursuant to a governmental policy or custom requires dismissal of his claims against the individual defendants as well. Failure of a civil rights plaintiff to expressly state whether an individual defendant is being sued in his individual or official capacity may be construed as an intent to sue the person only in his official capacity. Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989). Even in those circuits which do not indulge the presumption, a court may resolve doubt as to whether an official is sued personally, in his official capacity, or in both capacities by examining the

course of the proceedings and the nature of the liability sought to be imposed. Rodriquez v. Phillips, 66 F.3d 470, 482 (2nd Cir. 1995). In the case at bar, Mr. Mulbah describes the individual defendants as employees or agents of the defendant school board, and asserts that they were "at all times . . . acting pursuant to the authority invested in (them) by the defendant board under the color of state law." See Amended Complaint, "common allegations," pages 3-4. It is thus reasonable to assume that plaintiff's allegations against the individual defendants are based upon their official actions. Naming a government official in his official capacity is the equivalent of naming the governmental entity which employs him, and requires the plaintiff to establish a Monell type cause of action. Brandon v. Holt, 469 U.S. 464 (1985). On that basis, I conclude that plaintiff's failure to allege that the individual defendants acting pursuant to a custom or policy of the school system is fatal to his claims against them.

Argument 4 - Plaintiff's 42 U.S.C. § 1985 Claim (Count III) Must be Dismissed as a Matter of Law.

Count III of plaintiff's Amended Complaint alleges that the defendants "conspired to interfere with plaintiff's civil rights for the purpose of depriving plaintiff of the equal protection of the laws or of privileges under the law. . . . As stated above, however, all of the defendants named in the Amended Complaint play official roles in the Ypsilanti School System. Defendants assert that plaintiff has failed to state a cause of action upon which relief can be granted because, under the "intracorporate conspiracy doctrine," the defendants constitute only one "person" for purposes of conspiracy analysis.

In Hull v. Cuyahoga Valley Joint Vocational School District Board of Education, 926 F.2d 505 (6th Cir. 1991), a

non-tenured black female teacher brought a civil rights action against an Ohio schoolboard, the superintendent, the executive director and a school administrator after her employment contract was not renewed. In upholding the trial court's grant of summary judgment for the defendants, the United States Court of Appeals for the Sixth Circuit held that a corporation cannot conspire with its own agents or employees.

> [P]laintiff is alleging a conspiracy between a school district superintendent, the executive director of the district, and a school administrator, all of whom are employees or agents of the board. Since all of the defendants are members of the same collective entity, there are not two separate "people" to form a conspiracy.

Hull, 926 F.2d at 509-10. While it recognized that the theory upon which it ruled had been developed in the context of antitrust litigation, the Court relied upon its earlier decision in Doherty v. American Motors Corporation, 728 F.2d 334, 339 (6th Cir. 1984) for the proposition that "the same rule has been consistently applied in allegations of conspiracy under the Civil Rights Act." (citation omitted). Doherty, in turn, had relied upon a Second Circuit Court of Appeals decision in Herrman v. Moore, 576 F.2d 453 (2nd Cir. 1978), which held that the "intracorporate conspiracy" doctrine constituted a bar to the plaintiff's 42 U.S.C. §1985 claim.

Plaintiff has provided no basis upon which to distinguish this case from that presented in Hull. Accordingly, I recommend that Count III of the Amended Complaint be dismissed.

Argument 5. Plaintiff's Eiliott Larson Civil Rights Act and Title VII Claims (Counts IV - VII) Must be Dismissed as a Matter of Law.

Counts IV through VII of the Amended Complaint each assert that the defendants violated plaintiff's rights under the Federal Civil Rights Act of 1964 and Michigan's Elliott Larson Civil Rights Act. Those counts assert violations of plaintiff's rights to be free from discrimination based upon race (Count IV), national origin (Count V), and gender (Count VI). Count VII alleges unlawful retaliation against plaintiff resulting from his efforts to vindicate his civil rights. For the reasons that follow, I recommend that Counts IV through VII of the Amended Complaint be dismissed.

To the extent that plaintiff asserts Elliott Larson and Civil Rights Act claims against the Ypsilanti Board of Education, his claims must fail for the reasons set out in my analysis of Argument 1. Simply stated, the Ypsilanti Board of Education is not a body vested by Michigan Law with the right to sue or be sued. Thus, it is not a proper party in this action.

Plaintiff's Elliott Larson and Federal Civil Rights Act claims against the individual defendants must also fail. As stated in the defendants' brief, individuals are not "employers" for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Wathen v. General Electric Company, 115 F.3d 400, 403-06 (6th Cir. 1997); Comiskey.v. Automotive IndustryAction Group, 40 F.Supp. 2nd 877, 891 (E.D. MI 1999). To the same effect, both federal courts and Michigan state courts have ruled that individuals cannot be sued under the Elliott Larson Civil Rights Act. Jager v. Nationwide Truck Brokers, Inc., 252 Mich.App. 464, 478-79; Hall v State Farm Insurance Company, 18 F.Supp. 2nd 751 (E.D. MI 1998).

As plaintiff's Counts IV through VII are not asserted against any defendant subject to liability under the Civil Rights Act of 1964 or the Elliott Larson Civil Rights Act, those counts of the Amended Complaint must be dismissed.

Argument 6 - Plaintiff's Claim of Tortious Interference With a Contract or Advantages Business Relationship or Expectancy (County VIII) Must be Dismissed as a Matter of Law.

The final count of plaintiff's Amended Complaint asserts that the defendants intentionally interfered with his contractual relationship with the Ypsilanti Board of Education. For the reasons that follow, I recommend that Count VIII be dismissed.

For the reasons discussed in the analysis of Argument 1, above, I find that the Ypsilanti Board of Education is not a proper party defendant in this action. Even if such were not the case, however, defendants' claim of contractual interference against that entity would be subject to dismissal. Count VIII of the Amended Complaint alleges that the defendant Board and the plaintiff were parties to the contract at issue. Under Michigan law an action for tortious "interference" with a contractual relationship may not be brought against a party to the contract. Costello v. Rockwell Int. Corp., 189 Mich.App. 241 (1991).

In Reed v. Michigan Metro Girl Scout Council, 201 Mich.App. 10 (1993), the Michigan Court of Appeals held that a corporate agent cannot be held liable for tortious interference with the corporation's contracts in the absence of a showing that the agent was acting solely for his individual benefit, and in no way for the benefit of the corporation. "To maintain a cause of action for tortious interference, (a

plaintiff) must establish that the defendant was a "third party" to the contract or business relationship." (citing Dzierwa v. Michigan Oil Company, 152 Mich.App. 281, 287 (1986). In the case at bar, all of the individual defendants are agents/employees of the Ypsilanti School System. The general allegations of plaintiffs Amended Complaint characterize each individual defendant as an employee or agent of the defendant Ypsilanti Board of Education, acting pursuant to the authority invested in him/her by the defendant Board under the color of State law. As observed by the defendants, plaintiff has failed to assert that the individual defendants acted solely for their own benefit with no benefit to the corporation. See, Bradley v. Phillip Morris, Inc., 194 Mich.App. 44, 50-51 (1992). In the absence of such allegations, plaintiff fails to state a claim against the individual defendants upon which relief may be granted. Accordingly, Count VIII should be dismissed.

C. Conclusion

For all of the above reasons, I find that plaintiff has failed to allege a prima facie case upon which relief may be granted under any Count of the Amended Complaint. A pro se litigant's Complaint is to be construed liberally, Middleton v. McGinnis, 860 F.Supp. 391, 392 (E.D. MI 1994) (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)); that is, they are held to a "less stringent standard" than those drafted by attorneys. Haines v. Curner, 404 U.S. 519, 520 (1972). Such complaints, however, must plead facts sufficient to show that a legal wrong has been committed from which plaintiff may be granted relief. Dekoven v. Bell, 140 F.Supp. 2nd 748, 755 (E.D. Mich 2001). Despite the liberal pleading standard accorded pro se plaintiffs, this Court should find that plaintiffs Amended Complaint is subject to dismissal, without prejudice, for failure to state a claim upon which relief may be granted. I further recommend that plaintiff be afforded the

opportunity to seek leave under Federal Rule of Civil Procedure 15 to file a Second Amended Complaint. Pro se litigants should be given a chance to amend their complaints to identify the proper parties. Berndt v. Tenessee, 796 F.2d 879 (6th Cir. 1986). Denial of an amendment to a pro se complaint under Fed.R.Civ.Proc. 15 would be error in the absence of some significant showing of prejudice to the opponent. Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir. 1986). Nonetheless, if the court finds that a proposed amended complaint does not cure the deficiencies of the current pleading, the motion to amend may be denied. Head v. Jellico HousingAuthority, 870 F.2d 1117, 1123-24 (6thCir. 1989).

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Section 636(b)(1)and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991). Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/_____
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: 5/14/03